THE

AMERICAN LAW REGISTER.

NOVEMBER, 1870.

MUNICIPAL SUBSCRIPTIONS AND TAXATION IN AID OF RAILROADS.

The publication in the Law Register, of the recent decision of the Supreme Court of Michigan, in *The People ex rel. The Detroit, &c., R. R. Co.*, v. *The Township Board of Salem*, (ante 487), holding an act of the legislature authorizing municipalities to aid railroads, void, and the favorable comments by the editors, have led some members of the bar of that court, who dissent from this opinion, to desire that a statement of the grounds of this dissent should be published in like manner.

The first question to be regarded in considering the propriety of a decision of a court holding an act of the legislature void, is the source and limits of the power of the court in holding acts of the legislature void.

This is a subject which has been heretofore frequently considered by the Supreme Court of the state of Michigan, and the rules laid down have been uniform. In *Sears* v. *Cottrell*, 5 Mich., 255, MANNING, J., says, "The judiciary is not above the laws and the constitution. Its province is to declare what the constitution and laws are, giving a pre-eminence to the former, and declaring the latter void only when repugnant to it." In the same case, CHRISTIANCY, J., in the course of an able discussion of the powers of a state government, says, p. 257, "The purpose and object of a state constitution, are not

to make specific grants of legislative power, but to limit that power where it would be otherwise general, or unlimited." Again, on page 258, he says, "Without any limitation of the legislative power in our constitution, that power would have been at least as absolute and unlimited within the borders of this state, as that of the Parliament of England, subject only to the Constitution of the United States. The simple creation by a state constitution of the legislative power without any express, specific grant of power, and without any express limitation, would have conferred this unlimited power." Again, on the same page, "From the principles above laid down, it follows as a corollary, that an act of the state legislature not prohibited by the express words of the constitution, or by necessary implication, cannot be declared void as a violation of that instrument." Again, on page 259, "No rule of construction is better settled in this country, both upon principle and authority, than that the acts of a state legislature are to be presumed constitutional until the contrary is shown, and it is only when they manifestly infringe some provision of the constitution, that they can be declared void for that reason. In cases of doubt, every possible presumption not clearly inconsistent with the language and subject matter, is to be made in favor of the constitutionality of the act. The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the con flict." Judge CHRISTIANCY further shows in the same case, pages 260 and 261, that an act can be declared void only when it infringes some particular provision of the constitution, and not because it is opposed to the spirit of the constitution generally. MARTIN, C. J., concurred in the opinions of MANNING and CHRISTIANCY. CAMPBELL, J., alone dissented.

In the case of *Tyler* v. *The People*, 8 Mich., 333, MANNING, J., delivering the opinion of the court, says, "In *Sears* v. *Cottrell*, 5 Mich., 251, we stated in substance if not in words, that to warrant us in declaring a statute unconstitutional, we should be able to lay our finger on the part of the constitution violated, and that the infraction should be clear and free from a reasonable doubt. We still adhere to the views then expressed." In

Twitchell v. *Blodgett*, 13 Mich., 152, CHRISTIANCY, J., quotes from his opinion in *Sears* v. *Cottrell*, the main portion of the extracts quoted above, and says that he has seen no reason to change the views there expressed. In the same case, page 162, COOLEY, J., says, "It is conceded to be the settled doctrine of this state, that every enactment of the state legislature is presumed to be constitutional and valid, that before we can pronounce it otherwise, we must be able to point out the precise clause in the constitution which it violates, and that the conflict between the two must be clear, or free from reasonable doubt, since it is only from constitutional provisions, limiting the legislative power and controlling the legislative will, that we derive authority to declare void any legislative enactment. And the rule so well settled here is not left in doubt by decisions elsewhere."

In *The People* v. *Mahony*, 13 Mich., 501, COOLEY, J., again says, "An unbroken series of decisions in this state has settled the rule of law, that before we can declare an act of the legislature invalid, its provisions must be found to conflict with the constitution."

The decisions in 13 Michigan were made in 1865. There have been no subsequent decisions modifying them until the recent railroad decision. The quotations we have given, show that in Michigan, at least, these two things were as well settled as anything can be settled by judicial decision. 1, That no act of the legislature can be declared void unless it conflicts with some express provision of the constitution, and that the court must be able to point out the provision. 2, That an act of the legislature cannot be declared void if there be a reasonable doubt of its unconstitutionality.

The first of these propositions, three of the judges, constituting a majority of the court, two of whom are the same judges, CHRISTIANCY and COOLEY, whose words have been quoted above, have set aside. They have done this, not by saying that on further examination they are convinced that their former opinions are erroneous, but by holding the railroad act unconstitutional, without referring to a single provision of the state constitution, or attempting to point out any conflict between the

act declared void, and the fundamental law. Judge COOLEY, referring to the taxing power, says: "It is conceded, nevertheless, that there are certain limitations upon this power not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints, as if directly imposed in the most positive form of words." If Judge COOLEY means by this, to say only, that the constitution may prohibit a certain thing by implication as well as expressly, his doctrine is not necessarily in conflict with his previous views, but in the application of the doctrine to the case, he should certainly have shown the provision or provisions with which, by implication, the railroad act is in conflict. That he meant to assert that an act of the legislature may be declared void, though not in conflict with any provision of the constitution, is shown where he says: "Equally superfluous is it to consider in detail, the several express provisions of the state constitution, which the respondents suppose to be violated." If in deciding whether an act is constitutional or not, it be superfluous to consider an express provision of the constitution, that is to say, any provision, for the word "express" adds nothing to the thought,—then an act may be declared void, though not in conflict with the constitution. Judge COOLEY does, then, set up some standard aside from the written constitution, by which to judge of the validity of an act of the legislature. In doing this he not only reverses what he has so recently declared to be the settled law of the state, but he leaves the constitutional law of this state in the most dire confusion. If a law may be declared void because conflicting with the notions of a court as to fundamental theories of justice not contained in the constitution, then it is impossible for a legislature to determine, with any certainty, as to the validity of the acts they are called upon to pass. Few laws of general operation exist which do not conflict with somebody's notions of right. Judges, like other men, are liable to have very peculiar opinions as to fundamental theories of the true sphere of government, and if they can set aside acts of the legislature because in conflict with their opinions, all certainty as to questions of constitutional law is at an end.

It seems clear also, that the Supreme Court of Michigan have abandoned the position that an act of the legislature cannot be declared void if there is a reasonable doubt of its unconstitutionality; for acts like the one before them, under constitutions not differing from that of the state of Michigan, so far as this point is concerned, have been held valid by the courts of twenty-two states of the Union, in many cases, after the fullest argument and consideration. They have also been held valid by legislatures and governors, almost without number. Can it be possible that Judge COOLEY and his associates mean to say that an act, the principle of which is sustained by such a weight of authority, by the opinions of so many courts and legislatures, is void beyond any reasonable doubt? To say this, is to assert in them a confidence in their own opinions, which is inexplicable. We prefer to believe that they have abandoned their former position, and now think it their duty to declare an act void when such is the result of their examinations, whatever doubt there may be left in their minds.

Having shown that the Supreme Court of Michigan, have, in their recent decision, overthrown what was before the settled law of the state, let us consider what principles they have declared, on the basis of which they have held the act in question, void. Having assumed to set aside an act of the legislature for some other reason than because it conflicts with a written constitution, we should expect the greatest clearness in the statement of the principles on which they have acted. We regret to say that we find no such clearness. But so far as we can, we shall undertake to state the principles on which, either by implication or expressly, they have proceeded. They say that taxation must be imposed for a public, and not a mere private purpose. As a principle of natural justice, we think this is true. But unless based upon some provision of the constitution it is not in the province of a court to assert it.

The court, by implication, determine that it is their province to decide whether the object of taxation in a given case is public or private. Nor do they confine themselves to determine whether the public interest may in any way be promoted by the taxation in question. It is obvious to any one that the

building of a railroad may be a great public benefit, and the court do not deny this. But they say in effect, that though the building of a railroad may be a public benefit, yet it is not such a benefit as will authorize taxation. In other words they assume to themselves the power of determining what kind of public interest will justify taxation, and what will not. The power thus to decide upon the objects of taxation is one of the most important of government. It is the power to decide upon the objects of government. Upon no subject, perhaps, connected with government, have there been so many different and conflicting theories. There is no subject which it is more impossible to settle by general principles. It is also a matter which may be of the widest public interest, one which may excite the feelings and prejudices of opposing parties to the highest degree. It seems to us that it is dangerous for the judiciary to attempt the decision of such questions. They are too weak to put their unsupported philosophical theories as to the proper limits of governmental power against the popular will. Supported by plain constitutional provisions, they may be able to stand the storm of general public indignation. But without this, and when relying only upon their own notions of what government should do, they are more likely to injure their own just influence than to control the popular will.

Having assumed this power of determining the proper objects of taxation, the Supreme Court of Michigan further decide that taxation to aid the building of railroads to be owned by private parties or corporations, is not lawful. We do not suppose they mean to hold that states may not build railroads to be owned by themselves, in the absence of constitutional restriction, though the evils of this course would probably be much greater than that of gifts in aid of railroads owned by others. The principles which they announce do certainly go so far as this, that neither municipalities, a state, or the United States, can legitimately tax in aid of railroads owned by private corporations or individuals. This principle does not depend upon the particular circumstances of this time, but must be supposed to be of general application. If correct then, if the United States were at war, and the building of a new railroad became a military

necessity, it could only be accomplished by the direct instrumentality of the government. It could not be done by aiding private corporations to build a road which the government might use but not own. The military necessity for a railroad could be provided for by the government in only one way, and that probably, much the most objectionable. Again, if it is not lawful to tax in aid of railroads, it is not lawful to give the public property for a like purpose. The consequence is, that all the gifts of lands by the United States, or individual states to railroads, are void. The bonds issued in favor of the Pacific Railroad are void, as a matter of course.

The court undertakes to support the position that the public benefit to be derived from railroads is not sufficient to support taxation in their favor, by several considerations. They say that this public benefit does not differ in kind from that derived from building a mill, or a store. Concede this. It is also true that the public benefit derived from the construction of a common road does not differ in kind from that derived from a railroad. A common road is a means for the passage of passengers and freight. A railroad is the same. Every means of travel to and from a place is a benefit to the place. The less expense involved in the transit, the greater is the benefit. The fact that the common road is the property of the public, and the railroad that of a private corporation, does not make the benefit in one case to differ in kind from that in the other. The benefit in both cases is the same,—that of cheapening the cost of transit. So if taxation cannot be used in favor of a railroad, because the public benefit derived from it differs only in degree from that arising from the building of a mill, neither can it be used in favor of a common road for the same reason.

A second consideration which the court uses in favor of its general position is, that taxation is not lawful where the money raised is to be given to some private corporation or individual, and the only benefit which the public gets is incidental. This principle, though perhaps sufficiently indicated in Judge COOLEY'S opinion, is more fully stated by Judge CHRISTIANCY. It is a principle of very wide application. If money cannot be raised by taxation in favor of private corporations, of course the

public property cannot be given to such corporations. All laws giving bounties to any particular industries, are void. All tariffs for the sake of protection come under the same head. All gifts by the state to churches or private schools are void. The homesteads given to actual settlers are still the property of the United States. Neither do we see how, consistently with this principle, it is possible to justify the exemption from taxation of churches, libraries, and private school property. The principle carried out fully would destroy a considerable portion of the legislation of almost every state in the Union, as well as a large share of that of the United States.

Again, Judge COOLEY says, that the public purpose for which taxes may be raised, has no relation to the public benefit to be derived therefrom. The term "public purpose" is merely one of "classification to distinguish the objects for which, according to settled usage, the government is to provide, from those which, by the like usage, are left to private inclination, interest or liberality." The argument, we suppose, is that railroads are not one of the public interests for which taxation can be justified, because they have not become so by usage. To this we say, that the pratice of assisting railroads by public taxation has been so extensive in this country almost from their origin, that it would seem to go far toward establishing the necessary usage. But if no such usage had been established, in the absence of constitutional restriction, what is to hinder the present generation from adding a new usage? Must this generation live in the bands which the preceding generations have woven without the possibility of adding new subjects to those already recognized as fit for public support?

Judge COOLEY concedes that railroads are public in such sense as to justify the exercise of the right of eminent domain in their favor. He concedes them to be public then, in a sense in which neither a store nor a newspaper enterprise is public. How, then, does he know that they are not public in such sense that the public money may not be used in their aid? The necessity for the exercise of the right of eminent domain in favor of railroads may be greater than that for taxation in their favor, and the law-making power, may, perhaps, well enough make a dis-

tinction between the two on this account, but where does the court get its authority for making such a distinction?

The substance of our criticism may be comprised in a few lines. We say that the Supreme Court of Michigan have undertaken to establish a certain theory of the powers of government not found in the constitution of the state. In favor of this theory when established by the proper power, the people, as recently in Illinois, much may be said, and we have now nothing to say against it. But to its establishment by the court there are two objections,—First, It is in excess of their power and hence becomes exceedingly dangerous as a precedent; Second, It interferes with vested rights which ought to be held sacred. For a court cannot make new laws for the future merely. What it declares to be the law is assumed to have always been the law. Hence, if it assumes to set aside a principle which has long been acted upon, it destroys at the same time all the rights which depend upon that principle.

In the case under consideration, the Supreme Court of Michigan have destroyed millions of property whose holders are as innocent of evil intent, or of even carelessness as are the holders of any other property. If the principle which they have announced should be declared to be the law by the courts of all the states and of the United States, it would destroy the title to hundreds if not thousands of millions of property now held by *bona fide* holders.

That any court should ever have undertaken out of its own unsupported theories of government to announce a principle thus destructive of vested rights will always be to us one of the wonders of judicial decision.

C. A. KENT.

The question of the power of towns, counties, and other subordinate municipal corporations to issue bonds, or otherwise pledge their credit in aid of the erection of railroads and other like enterprises, has been much mooted of late years. The tendency of the courts has been generally to sustain the legality

and binding obligation of such action, but the late decision of the Supreme Court of Michigan, in *The People ex rel. The Detroit and Howell R. R. Co.* v. *The Township Board of Salem*, published in the August number of the Register, goes to the full extent of holding such subscriptions to be wholly void. The opinion delivered by COOLEY, J., is elaborate, learned, and exhaustive, and is highly approved in editorial notes attached to the opinion as there published.

With the utmost deference and respect for the ability and experience thus arrayed upon that side of the question, we yet are constrained to differ in opinion, and submit the following suggestions upon the other side.

The point of the decision made is that a railroad is not a *public* highway in the same sense as a common road, but is a private enterprise or institution, intended "primarily to benefit a private corporation," though having also the effect to add to the value of lands in adjacent localities; and that, consequently, no tax can be laid, or corporate liability leading to taxation incurred, in aid of it. We differ entirely upon this point, and deem the arguments used to establish it fallacious.

In order to present our views intelligibly, we propose in the first place to set out certain general propositions which we apprehend will not, at least after due reflection, be denied.

I. This matter of opening roads, canals, and other like improvements, is one which pertains not so much to law as to politics. It is a branch of political economy. The state, or the legislature acting in its behalf, is bound in all proper ways to increase the public annual money income. Wealth is power, in peace and in war.

The legislator, casting his eye, as it were, over the land, perceives a certain tract which, though fertile and productive, is yet of little value, for the simple reason that it has no easy access to a market. The cost of transporting its crops is greater than the price to be obtained. It consequently yields little or no net money income, and can pay little or nothing in annual taxes for the support of the state. A road or a canal, or, better still, a railroad would *set that land up* close alongside the market. The effect would be that the expense of

transporting crops is reduced to a mere trifle. Every penny thus saved is so much added to the annual income of the land. In view of this saving the land becomes more desirable and rises at once in market value. Value depends upon, and is graduated by, income. The land thus enhanced in value takes rank with lands lying near to the market, and begins to contribute equally to the public burdens; and thus either adds to the public income, or diminishes the burden upon others.

This matter of opening roads, and other means of facilitating intercourse between distant localities, is one of immense interest and importance. The results are wonderful. England, it is said, owes her wealth and power mainly to the fact of her having always had good roads. Massachusetts is to-day wealthy because of her numerous roads. There is a vast field for study and thought in this connection. A road adds to the value (by adding to the net income) not only of the farming lands to which it leads, but of the lots in the market town; to every foot of land along its whole length, and to lands beyond and at its side; in a word, to every business locality which by means of it is brought nearer (so to speak) to other business localities.

II. The state possesses the eminent domain, to wit, the ultimate or superior ownership of all lands lying within its boundaries. Individuals are permitted to acquire lands and thus to own them, exclusive of all other individuals. But the state has an ownership beyond this, and may at its pleasure resume the actual possession. This cannot be done, however, under our republican government, unless the land is to be taken for a *public use.*

This phrase, the public use, is one which, we submit, is often misapprehended. It does not signify the public *user*,—that the land when taken is to be used, occupied, dwelt upon, travelled over, or the like. The word *use* is, as in old English law, synonymous (or nearly so) with benefit, behoof, and the like. The word *public* does not signify the individuals composing the body politic, but the state as a unit. In England the public highway is more often called the king's highway, implying that the king as representing the state is the owner. So here the

phrase, public highway, means we submit, simply that the land embraced within its boundary lines is *public property*, to wit, the property of the state as a unit; the state has asserted its eminent ownership and thrust aside the private proprietor.

Lands are often taken under this right of eminent domain which yet are never "used" or physically occupied by the individuals composing the "public;" as, for example, for forts, penitentiaries, and the like, and yet such lands are confessedly taken for a public use. Personal property, as provisions, have been destroyed by the state authorities to prevent their falling into the hands of the enemy, and yet the taking for that purpose has been held to be a taking for a public use: *Grant* v. *U. S.*, 2 Nott & H. (Court of Claims Reports), 551.

III. The public, meaning the individuals composing it, have a right to travel the road, and do so; but the public, meaning the state, does not travel or "use" the road in that sense. The phrase the *public use* signifies then, we submit, the profit, the pecuniary profit or gain of the state as a whole—the economical, material advantage, or benefit to the body politic, as such. This profit, or benefit to the state, comes from the increase of the net annual income (and thereby of the market value) of adjoining lands, in a word, an increase of the taxable contributing capital within the bounds of the state, an increase of the fund in the hands of individuals, out of which annual taxes are to be paid.

IV. While the state as a unit, and the citizens and tax-payers generally, are thus benefited, the lands themselves, which are directly affected by the road, are benefited in a much higher degree. They are, as it is often called, specially benefited. The lands so benefited, are those which are, by means of the road, set up nearer, and are by that means and process, enhanced in value. There is a kind, or mode of "benefit," styled "local and peculiar," which is different from this, but need not be defined here. Lands distant from the road, and not made more accessible by it, are not *specially* benefited nor affected in value, except, by means of a diminution of taxes.

V. Upon taking lands for a public use, the state must make compensation to the private owner. This it may do out of its

public treasury, and out of funds raised by general taxation. Lands taken for a street within the bounds of the city, or for a county road, may thus be paid for. On the continent of Europe nearly all the railroads are built by the government, and paid for of course, out of the general fund of the state. The state, instead of paying for the land out of its general fund, may authorize the levy of a special tax for the purpose, and raise it by taxation all over the state. It may, on the other hand, raise this special tax out of the property "specially benefited." This point has been often contested, but is now settled law, and is clearly just. This mode of taxation is styled the "assessment of benefit," and is practised extensively.

VI. The state, instead of itself exercising its own discretion and right of eminent domain (through its legislature or otherwise), often deputes those powers to subordinate municipal bodies, as cities, towns and counties. When thus authorized to act, those bodies have all the powers of the state itself. They are vested with a discretion which is unlimited. They are to be guided by their own judgment, as to the economical effects to be produced. The will of the majority is to govern, and the minority must submit. They may take the land of an individual, and no power on earth can prevent. They may raise the funds for compensation by general taxation, or by the "assessment of benefit," as the state law provides.

The town of Salem for example, might, beyond question, if authorized by the legislature, open a road running from one extreme of the town to the other, and might vote a tax for the purpose, and the vote of the majority would bind the whole.

VII. It seems to us perfectly clear that the legislature of Michigan might, in view of the profit to accrue to the state as such, lawfully itself, vote to take land for the Detroit and Howell Railroad, and might order a special tax to be levied upon the lands to be specially benefited, for the purpose of paying for the land taken. It might also, we submit, itself build the road and levy a further tax on the same lands for that purpose. If it could itself, do this, it could, we submit, depute those powers to subordinate municipal bodies. In doing this it would do

no more than is done every day in reference to roads and streets.

If the town of Salem were thus authorized to tax the lands situated within its limits, and if its constituted authorities, or better still, its citizens in corporate meeting assembled, were to decide that all those lands would, in their judgment, be "specially benefited" by the railroad (as doubtless they would be), we can see no reason why the vote of the majority would not bind the whole, as much as a vote of the legislature itself, or as much as a vote of the majority, in reference to a common road. If the majority, when authorized by the legislature, may in their discretion, vote to bring the two ends of the town up nearer together, we see no reason why they might not, if so authorized, vote to bring the whole town, as a body, up nearer to Detroit. Each of such votes is but the exercise, by the town for the state, of a state political economy.

Such a power entrusted to a town may be liable to abuse. But such abuse must consist only in an error of judgment as to the economical effect to be produced by the road. Such errors do not, at least now-a-days, often occur. A railroad is sure to enhance the value of lands to an amount far beyond the tax, and even the whole cost of the road. And besides, a town is quite as little likely to error in judgment as the legislature. But even if liable to abuse, that matter is one for the consideration of the legislature, and affords no ground for the interference of the courts.

VIII. The state, instead of itself opening and building a railroad, may authorize a private corporation to do so; and in such cases it vests the latter with its power of eminent domain, though not necessarily with its power of taxation. It also grants to the company the exclusive right to carry passengers and freight upon the road, and to charge a toll or compensation therefor. This right to take toll is a franchise, to wit, a right which the state itself can alone exercise, or authorize others to exercise.

The franchise is granted by the state for *a consideration*; which is the outlay of money by the company in opening, building and preparing to operate the road; in its risk of loss of

the money so invested; and in its obligation assumed to carry all passengers and freight that offer. In England the right to charge toll upon a turnpike (the king's highway) or upon a ferry over a public stream, was granted only upon a similar consideration.

This deputing the power of eminent domain, and the grant of right to carry for a toll, is a matter of convenience and economy to the state. The business can all be done to much better advantage by individuals than by the state; by private citizens whose private pecuniary interests are involved, than by public officers working upon a salary and liable to a removal at stated periods.

The fact that the private corporation is sure to make money by operating the road, has, we submit, nothing to do with the question at issue. In the first place, the company invests beyond recall and risks, its capital—often a very large amount—it incurs heavy obligations; for these it should be paid. In the second place, this is a matter for the consideration of the legislature alone. If in view of the benefit to accrue to the state finances, it sees fit liberally to reward the projectors of the enterprise, its decision is final. It is a matter of simple bargain and contract. In the third place, as a general rule, no public improvements are ever undertaken except at the instance of individuals who expect to profit specially thereby. Citizens, generally, do not feel sufficient interest. The latter are to be benefited, but only in a slight degree. The motive of self interest is a most important one in public affairs. It is the spur to vast public improvements, and the wise legislator will not ignore or discountenance it, nor decline to avail himself of it.

Secondly, We now approach particular points made in the opinion under consideration.

I. We agree entirely with the point that the three requisites set out are necessary to the validity of any tax, to wit, that the purpose must be public; the tax must be duly apportioned, and if laid upon a limited district such district must be "specially benefited." But we insist that these requisites are all fully complied with in the case in question.

II. The learned judge compares this railroad to a hotel, and

cites a Wisconsin case as deciding that a tax could not be raised to build the latter. This is, perhaps, not exactly a fair comparison, but yet something is to be said even as to such a case.

When individuals consent to reside in (say) a city, they agree to be bound by the will of the majority in respect to certain things. Those things are the matters which properly come within the scope and purpose of a city government. To increase the taxable value of the lands lying within the city is certainly within that scope and purpose. The opening of a public square, the introduction of pure water, the draining of a marsh and the like, all have that effect, and are legitimate objects for taxation. The erection of a hotel is very often likely to do the same, and each and every house and lot in the town is to yield and be worth the more for it.

A hotel attracts and detains visitors from abroad. Such visitors become customers to the merchant, the mechanic and others. The hotel keeper must buy meats and other supplies for them. All this makes the town lots used for business more productive of return to human labor, and thus more able to contribute to the public burdens. Lots for dwellings come into demand and yield a higher rent. As a matter of equity, it certainly is not fair that one obstinate lot owner should get this benefit and yet not share a burden which the rest are willing to assume. And as a matter of law we submit that he is bound by the will of the majority.

There is of course a limit beyond which the power of the majority cannot go. The rule is the same here as in every other association. The avowed object and purpose of the association is always to be kept in view. That is what gives it its distinctive character. To any attempt to go beyond that purpose, the individual may say, *non in haec fœdera veni.* A temperance society could not compel its members to contribute money to build a bowling alley, nor a bank apply its capital to manufacturing purposes. But a city government may, we submit, put in exercise a political economy, and have a discretion for that purpose not to be controlled by the courts. Such a power is, we submit, inherent in every body politic and is implied if not expressed.

The judge also compares the railroad to a grist mill. As to that we desire merely to say, that in many of the states laws exist by which lands may be taken for the purpose of flowage, in order to raise a water power to carry the mill. This is done under the power of eminent domain, and upon the ground that the land is taken for the public use. Such use (meaning always benefit, profit,) consists only in the diminution of distance and expense, and the consequent increase of net income to adjoining lands; thus creating additional taxable capital. This is pure and genuine political economy. These laws have been stoutly contested, but we believe their validity is now established. See *Todd* v. *Austin*, 8 Am. Law Reg., N. S., 9.

The learned judge likens the hackmen of Detroit to a railroad corporation, as carriers for hire. Those hackmen have not, by the investment and risk of private capital, added a hundred, or a thousand fold to the pecuniary resources of the state. They have not built the streets upon which they run; they have not set distant localities up together, nor in any manner benefited the state as a state.

III. The following passage occurs in the opinion: "If the township of Salem can be required to tax itself in aid of the Detroit and Howell Railroad Company, it must be either *first*, on the ground of incidental local benefit, in the enhancement of values, or *second* in consideration of the facilities which the road is to afford to the township for travel and business. The first ground is wholly inadmissible. The incidental benefit which any enterprise may bring to the public, has never been recognized as sufficient of itself to bring the object within the sphere of taxation. In the case of streets and similar public improvements, the benefits received by individuals have sometimes been accepted as a proper basis on which to apportion the burden; but in all such cases the power to tax is unquestionable, irrespective of the benefits. The question in such cases has not been of the right to tax, but of the proper basis of apportionment, when the right was conceded.

The second ground is more plausible. To state the case in the form of a contract, it would stand thus: The township is to give or loan to the company five per cent. of its assessed

valuation. In consideration whereof, the railroad company agrees to construct and operate their road, and to hold themselves ready at all times to give to the people of the township the facilities of travel and trade upon it, provided they will pay for such facilities, the same rates which are charged to all other persons. In other words, the company agree on being secured the sum mentioned, to take upon themselves the business of common carriers within the limits of the township. If this consideration is sufficient in the case of common carriers, it must be sufficient also in the case of any other employment."

This paragraph, we submit, is fallacious in many respects.

1. The judge makes a distinction, where there is, in fact, no difference. The enhancement of values caused by the road is exactly the same thing as the facilities to be afforded for travel and business. Or rather the one is merely the measure of the other. The increase of value is simply the estimate expressed in dollars and cents, which men put upon the facilities of communication.

Value is a thing not inherent in or attached to the land, like shape, color, or the like. It exists in men's minds. In putting a value upon the land, men take into view surrounding facts precisely as does a jury in estimating value or damage. Those facts lend a hue to the thing in question. Men *look through* them as at a landscape through stained glass.

The road is a fact, present or prospective. A right of way or travel over it exists in favor of the lands or their occupants. The road is an appurtenance to the lands, made so by the act of the legislature. In view of this fact and of the prospective savings of time and expense of travel and transportation, men begin to consider the land desirable as a location for business or residence, and will pay the more for it. The facility of communication is, therefore, the physical, material effect produced by the road; the increase of value the moral mental effect produced by the same means and at the same instant. One is the benefit, the other what that benefit is decided worth. A little reflection will, we think, convince any one that the increase of values in any locality caused by a railroad is traceable directly and exclusively to the fact that the lands are set up nearer to some other business locality, and that such increase of value

represents or measures all the value to all the world, of the facility of communication—that the benefit of the road to an individual travelling it, say the farmer, is that it saves his time, which time saved, is to be devoted to labor on his farm, making the latter more productive; and that the increase of value thus caused to the farm, is exactly the measure of the value of the saving of time to the individual, the farmer. There is a philosophy in this matter, which may not at first sight appear, but will do so fully on reflection. A farm is enhanced in value by the road, say five thousand dollars. This is but saying that the facility of communication is worth to it that sum. The expression, five thousand dollars worth of facility, is but another term for the facility itself; precisely as five thousand dollars worth of wheat is the same thing as the wheat.

If we are correct in our view, then a taxing based upon these facilities or their value is precisely the same thing as one based upon the increased values of the lands.

2. The incidental benefit to accrue to lands from a public improvement, to wit, the increase of value or the material benefit which is represented or measured by such increase of value, has, we submit, always and everywhere been recognized as sufficient of itself to bring the object within the sphere of taxation or assessment. This is, indeed, the only legal or just rule or object, for burden should be assessed upon and proportioned to benefit. We deny that the power of taxation—meaning special taxation or assessment to pay for a particular improvement—does exist irrespective of the benefit to be conferred by it. All lands in the state may be taxed for general purposes, as to pay state salaries and the like on the ground of benefit, to wit, protection, received by each and every tract; but no tax upon a limited district could lawfully be laid for such a general purpose, nor for any purpose except to pay for "special benefit" accruing to that district.

3. The term "incidental" is not properly applicable to this increase of value, for it is the primary, direct and immediate end and object sought by the legislature, and the effect directly and immediately produced; such increase of value being, as we have said, but the representative in money of the facility of commu-

nication. What benefits may be styled incidental we shall not stop to inquire, but surely this increase of value is not one.

IV. The learned judge says further: "There is nothing in the business of carrying goods and passengers which gives the person who conducts it a claim upon the public different in its nature from that of the manufacturer or the merchant."

To this proposition we assent. But the operating of the railroad when once built, is a thing entirely distinct and different from that of the opening and building. It is the latter, not the former, which is the consideration rendered to the state. It is the investment, in perpetuity and upon risk, of a large amount of private capital in such manner as to add to the wealth and power of the state as a state. Such an investment is the actual burying of so much money in the ground and is beyond recall. The carrying of passengers and goods for hire is a different matter; such business is unquestionably a private business, but the right to carry it on is the very thing which the state guaranteed or granted in consideration of the permanent investment made for its benefit..

V. The learned judge says: "When the state itself is to receive the benefit of the taxation in the increase of its public fund, or the improvement of its property, there can be no doubt of the public character of the enterprise."

This is doubtless the true doctrine. The question then comes to his: Does the opening of a railroad increase the public fund? That it does so in almost if not quite every instance there can be no sort of doubt. It develops lands otherwise wholly unproductive and valueless. Many a railroad has turned out profitless to the stockholders, and the money capital contributed has been wholly sunk. But yet the road has benefited the state as such, and added to its taxable capital ten fold its cost. For example, the railroads in Vermont, have, we believe, not paid the stockholders; but the state as a state is to-day far in advance of her former position in wealth and resources, simply by the building of those roads. Her farms, her marble quarries and other industries are all paying well. The owners of such properties could well have afforded to build the roads at their own expense. If they have, in fact, contributed to the

capital and have lost, yet their loss is far more than made up in the increase of net annual income and consequent enhancement of market values to their property. The state as a unit, thrives, as every state does, just in proportion to the thrift and prosperity of its owners of land and other fixed property.

Undoubtedly distress has been caused to individuals in some of the states by the issue of town or county bonds, and the levy of taxes to pay them. For example, a farmer is called upon to pay his tax who has little or no ready money. His lands to be sure are valuable—made so by the very railroad. He could, if he chose, sell it for twice as much as before, but he desires not to sell. To raise the money is to him a serious burden. But such a case of individual hardship must not stand in the way of great public improvements. Every individual who settles in a community and invests in real estate, assumes the risk of just such hardship. In the case put, the hardship comes from the very fact that the farmer is actually possessed of property, and is rich. It is one of the incidents of wealth, an instance of *embarras des richesses*. Many a man would gladly assume the hardship if the wealth also accompanied it.

In opening streets in cities, it often happens that a lot is enhanced greatly in value, but is owned by one who has no ready money or other available property. The assessment for benefit is in such a case a grievous burden, but it must be borne.

Finally. It will not be denied that as a general rule the legislature of a state has an unlimited discretion to decide whether a proposed improvement will or will not increase the wealth of the state, and thus be for a public use, nor that the legislature of Michigan has in the present case decided, tacitly it may be, that the railroad in question will have that effect. It would not otherwise have permitted the majority in the towns named to have voted a tax.

We may admit that if a legislature should be so wicked as to authorize such a tax in a case where the effect must be not to increase the wealth of the state as such, but merely of a private individual (though it is hard to conceive such a case, for the wealth of the individual citizens is the wealth of the state) the courts might interfere. But they should be very

cautious in so doing. Unless the case is entirely clear their interference would be usurpation.

In the present case there can be no question that the legislature decided wisely and well. This railroad will unquestionably develop lands now comparatively valueless, and add millions to the taxable capital of the state. A legislature can hardly go amiss on this point.

If, indeed, private corporations are to become unduly rich by running these roads; if the success of such companies in that business is so assured as that all risk of loss is gone; then it may be the duty of the state to limit their profits or otherwise curtail the privileges granted. But this is a matter for the legislature, not the courts. Unwise legislation is one thing, unconstitutional legislation is another.

S. T.

RECENT AMERICAN DECISIONS.

Supreme Court of Michigan.

CITY OF DETROIT *v.* BLAKEBY AND WIFE.

A municipal corporation is not liable, in a private action for damages, for injuries caused by neglect to keep its streets in repair.

The cases founded on mere neglect to repair, and on acts of positive misfeasance reviewed and distinguished by CAMPBELL C. J.

This was an action by defendants in error, against the city of Detroit, for damages received from the defective condition of a cross walk. In the Wayne Circuit Court the defendants in error had a verdict and judgment, to which the city took this writ of error.

The opinion of the court was delivered by

CAMPBELL, C. J.—The principal question in this case is, whether the city of Detroit is liable to a private action of an injured party for neglect to keep a cross walk in repair. The other questions involve an inquiry into the circumstances which would go to modify any such liability in the present case.

There has been but one case in this state decided by this court, where the claim for damages arose purely out of a neglect to repair. In *Dewey* v. *Detroit*, 15 Mich., 307, such a suit